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2 **UNITED STATES DISTRICT COURT**
3 **DISTRICT OF NEVADA**

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5 COLUMBINE DEVINCENT BATALONA,
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7 Plaintiff,

8 vs.

9 NANCY A. BERYHILL, Commissioner of
Social Security,

10 Defendant.
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2:18-cv-02309-JAD-VCF

ORDER

MOTION FOR REMAND [ECF No. 18]; MOTION TO
AFFIRM [ECF No. 23]

13 This matter involves plaintiff Columbine Devincent Batalona's appeal from the Administrative
14 Law Judge's ("ALJ") decision denying her social security benefits. Before the Court are Batalona's
15 motion for remand (ECF No. 18) and the Commissioner's cross-motion to affirm and response (ECF
16 Nos. 18, 23). The Court GRANTS plaintiff's motion to remand and DENIES the Commissioner's cross-
17 motion.
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19 **I. Standard of Review**

20 The Fifth Amendment prohibits the government from depriving persons of property without due
21 process of law. Social security claimants have a constitutionally protected property interest in social
22 security benefits. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203
23 (9th Cir. 1990). When the Commissioner of Social Security renders a final decision denying a claimant's
24 benefits, the Social Security Act authorizes the District Court to review the Commissioner's decision.
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1 See 42 U.S.C. § 405(g); 28 U.S.C. § 636(b) (permitting the District Court to refer matters to a U.S.
2 Magistrate Judge).

3 The District Court's review is limited. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir.
4 2015) (“[I]t is usually better to minimize the opportunity for reviewing courts to substitute their
5 discretion for that of the agency.” (quoting *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090,
6 1098 (9th Cir. 2014))). The Court examines the Commissioner’s decision to determine whether (1) the
7 Commissioner applied the correct legal standards and (2) the decision is supported by “substantial
8 evidence.” *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). Substantial
9 evidence is defined as “more than a mere scintilla” of evidence. *Richardson v. Perales*, 402 U.S. 389,
10 401 (1971); *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Under the “substantial evidence”
11 standard, the Commissioner’s decision must be upheld if it is supported by enough “evidence as a
12 reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*,
13 305 U.S. 197, 217 (1938) (defining “a mere scintilla” of evidence); *Gutierrez v. Comm’r of Soc. Sec.*,
14 740 F.3d 519, 523 (9th Cir. 2014). If the evidence supports more than one interpretation, the Court must
15 uphold the Commissioner’s interpretation. See *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005).
16 The Commissioner’s decision will be upheld if it has any support in the record. See, e.g., *Bowling v.*
17 *Shalala*, 36 F.3d 431, 434 (5th Cir. 1988) (stating the court may not reweigh evidence, try the case de
18 novo, or overturn the Commissioner’s decision if the evidence preponderates against it).

20 II. Background

21 The Administrative Law Judge (“ALJ”) followed the five-step sequential evaluation process for
22 determining whether an individual is disabled. 20 C.F.R. § 404.1520. The ALJ concluded plaintiff had
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1 not engaged in substantial gainful activity since October 14, 2014, the alleged onset date. (AR¹ 23). The
2 ALJ found plaintiff had the following severe impact impairments: degenerative disc disease, obesity,
3 arthritis of the knees, depression, and bipolar disorder. (*Id.*) The ALJ found plaintiff's impairments did
4 not meet or medically equal the severity of a listed impairment in 20 CFR Part 404, Subpart P, Appendix
5 1. (*Id.*). The ALJ assessed Batalona as retaining the residual functional capacity to perform the demands
6 of sedentary work but with the following specific limitations: "the claimant must avoid concentrated
7 exposure to vibrations; lift and carry 10 pounds occasionally and 10 pounds frequently; no balancing or
8 crawling; and she can perform all other postural activities on an occasional basis." (*Id.* at 26). The
9 claimant, "can stand and walk for two hours in an eight hour workday; sit for six hours in an eight-hour
10 workday with normal breaks; no ladders, ropes or scaffolds; and she cannot work at unprotected heights
11 or around dangerous moving machinery." (*Id.*) "[T]he claimant requires occasional cane use to
12 ambulate to and from the work site.... the claimant is limited to unskilled work." (*Id.*) The ALJ also
13 found that plaintiff meets the insured status requirements of the Social Security Act through December
14 31, 2009. (*Id.* at 23). The ALJ concluded that plaintiff was not under a disability within the meaning of
15 the Social Security Act from October 14, 2014 through the date of the decision on November 13, 2017.
16 (*Id.* at 34).

18 Plaintiff challenges the ALJ's conclusions on two grounds: 1) that the ALJ improperly rejected
19 Batalona's testimony, and 2) that the ALJ improperly rejected the opinion of a physician's assistant.
20 (ECF No. 18). Plaintiff argues that the ALJ failed to provide clear and convincing findings in support of
21 the ALJ's rejection of plaintiff's testimony regarding her pain, symptoms, and level of limitation. (*Id.* at
22 11). The plaintiff also argues that the ALJ failed to provide germane reasons for rejecting the opinions of
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25 ¹ The Administrative Record ("AR") is found at ECF No. 15.

1 the physician's assistant. (*Id.* at 6).

2 The Commissioner argues the ALJ's decision is supported by substantial evidence. (ECF No. 23
3 at 8). The Commissioner argues that the ALJ appropriately discounted her testimony because he found
4 that, "[p]laintiff's treatment was often conservative, and that she herself declined more aggressive
5 treatment modalities." (*Id.* at 6, citing to AR 28, 456). ("She does not wish to undergo anything other
6 than medication refills"; recommendation for Plaintiff to start 10-15 minutes of exercise twice per day).
7 (AR 28). The Commissioner also argues that the physician's assistant is not an acceptable medical
8 source pursuant to 20 C.F.R. § 404.1502(a), and that the ALJ thus gave germane reasons for discounting
9 the physician's assistant's statement."

10 **A. Rejecting Plaintiff's Pain and Symptom Testimony**

11 The ALJ must engage in a preliminary two-step analysis before discounting the claimant's
12 testimony regarding her subjective symptoms. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035- 36 (9th Cir.
13 2007). The ALJ must first determine whether the claimant has presented objective medical evidence of
14 an underlying impairment, "which could reasonably be expected to produce the pain or other symptoms
15 alleged." *Bunnell v. Sullivan*, 947 F.2d 341, 344 (9th Cir. 1991). The claimant "need not show that her
16 impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need
17 only show that it could reasonably have caused some degree of the symptom." *Smolen v. Chater*, 80
18 F.3d 1273, 1282 (9th Cir. 1996). If the claimant meets this first test, and there is no evidence of
19 malingering, "the ALJ can reject the claimant's testimony about the severity of her symptoms by
20 offering specific, clear and convincing reasons for doing so." *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,
21 883 (9th Cir. 2006). To reject the claimant's testimony, the ALJ must point to specific facts in the record
22 that demonstrate the individual's symptoms are less severe than she claims. *Vasquez v. Astrue*, 572 F.3d
23 586, 592 (9th Cir. 2009). General findings are not enough: the ALJ must identify which testimony is not
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1 credible and what evidence undermines it. *Lester*, 81 F.3d at 834. The ALJ's findings “must be
2 sufficiently specific to allow a reviewing court to conclude the adjudicator rejected the claimant's
3 testimony on permissible grounds and did not arbitrarily discredit a claimant's testimony regarding
4 pain.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015); citing to *Bunnell v. Sullivan*, 947
5 F.2d 341, 345-46 (9th Cir. 1991). The Ninth Circuit has found that, “an ALJ's 'vague allegation' that a
6 claimant's testimony is 'not consistent with the objective medical evidence,' without any 'specific finding
7 in support' of that conclusion, is insufficient.” *Treichler v. Comm'r of SSA*, 775 F.3d 1090, 1103 (9th Cir.
8 2014) (citation omitted).

9 The Ninth Circuit has explained that a conservative course of treatment suggested “a lower level
10 of both pain and functional limitation.” *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995). The
11 Ninth Circuit has also held that narcotics are not conservative treatments, especially in conjunction with
12 surgery. *Lapeirre-Gutt v. Astrue*, 382 F. App'x 662, 664 (9th Cir. 2010) (finding ALJ's reasons for
13 determining conservative treatment unconvincing because Plaintiff used narcotics, took injections for
14 back pain, and underwent surgery); see also *Childers v. Berryhill*, No. 3:18-cv-00170-RCJ-CBC, 2019
15 U.S. Dist. LEXIS 57474, at 25 (D. Nev. Mar. 12, 2019) (“Many courts consider the use of
16 narcotics...for pain management not conservative in nature”).
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18 The ALJ found plaintiff's medically determinable impairments could be reasonably expected to
19 cause the alleged symptoms. (AR at 27). The ALJ found that that Batalona's statements concerning
20 intensity, persistence, and limiting effects of her symptoms are “not entirely consistent with the medical
21 evidence and other evidence in the record.” (*Id.*) The ALJ summarized the medical evidence, including
22 plaintiff's multiple surgeries and treatments, but he did not identify which portions of Batalona's
23 testimony contradicted the evidence or what he found not credible. AR 27- 30. The ALJ's general
24 statements regarding the insufficiency of the medical evidence fall short of the specificity required by
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1 the Ninth Circuit.

2 As the Commissioner points out, although the ALJ did not provide a specific analysis of
3 Batalona's testimony, the ALJ appears to reject Batalona's testimony based on his assessment that her
4 treatment is conservative. (ECF No. 23 at 6). The ALJ summarizes plaintiff's many surgeries and notes
5 that plaintiff's doctor has prescribed her many opiod (narcotic) pain relievers (AR 27-30; AR 1373). (At
6 the hearing, the ALJ stated that Batalona's medical records show, "chronic narcotic use" due to her
7 prescription drug history. (AR 53, citing to AR 1373)). The ALJ cites to plaintiff's medical record for
8 the proposition that plaintiff, "does not wish to undergo anything other than medication refills" rather
9 than follow her doctor's recommendation, "to increase physical activity as tolerated, including 10 to 15
10 minutes of exercise twice a day." (AR 28).

11 The ALJ summarized Batalona's narcotic use and many surgeries, but he did not provide an
12 analysis regarding how her specific testimony regarding her pain and symptoms contradicted the
13 medical record. The Commissioner's argument, that it appears that the ALJ characterized Batalona's
14 treatment as conservative in nature, is not persuasive because the Ninth Circuit has held that prescription
15 narcotic use, especially in conjunction with surgery, is not conservative in nature. The Court finds that
16 the ALJ did not make specific, clear, and convincing findings regarding how plaintiff's testimony is
17 contradicted by the record.

18 Because the Court is recommending that the plaintiff's case be remanded on the issue of the
19 ALJ's failure to give clear and convincing reasons for rejecting plaintiff Batalona's testimony, the Court
20 does not reach the other issue regarding the ALJ's rejection of the physician's assistant's opinion raised
21 by the plaintiff in this appeal.

22 **III. Remand**

23 The Court finds the ALJ did not give clear and convincing reasons for discrediting plaintiff's
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1 testimony. The Court recommends the case be remanded to the agency for further administrative
2 proceedings. When the Court finds an ALJ erred in denying social security benefits, ordinarily the Court
3 “must remand to the agency for further proceedings before directing an award of benefits.” *Leon v.*
4 *Berryhill*, 874 F.3d 1130 at 5 (9th Cir. 2017, amended Jan. 25, 2018) (citing *Treichler v. Comm’r of*
5 *SSA.*, 775 F.3d 1090, 1099 (9th Cir. 2014)).

6 The “credit-as-true,” rule permits a direct award of benefits on review in rare circumstances. *Id.*
7 at 3. Under the three-part rule, the Court first considers whether the “ALJ failed to provide legally
8 sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion.” *Id.* at 6. This
9 step is met for the reasons set forth above. At the second step, the Court considers whether there are
10 “outstanding issues that must be resolved before a disability determination can be made” and whether
11 further administrative proceedings would be useful. *Treichler*, 775 F.3d at 1101. “In evaluating this
12 issue, [the Court] consider[s] whether the record as a whole is free from conflicts, ambiguities, or gaps,
13 whether all factual issues have been resolved, and whether the claimant’s entitlement to benefits is clear
14 under the applicable legal rules.” *Id.* at 1103-1104. “Where . . . an ALJ makes a legal error, but the
15 record is uncertain and ambiguous, the proper approach is to remand the case to the agency.” *Id.* at 1105.
16 Because the ALJ’s findings regarding the claimant’s subjective testimony are inadequate, remand for
17 further findings on credibility is appropriate. See *Byrnes v. Shalala*, 60 F.3d 639, 642 (9th Cir. 1995).
18 The Court finds further administrative proceedings are necessary and recommends the case be
19 remanded.
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1 Having reviewed the administrative record as a whole, the Court finds that the ALJ's decision is
2 not wholly supported by substantial evidence and recommends the case is remanded.

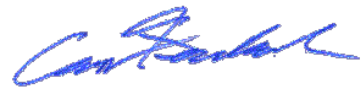
3 Accordingly, and for good cause shown,

4 IT IS HEREBY ORDERED that plaintiff's motion for reversal and/or remand (ECF No. 18) is
5 GRANTED and the case is REMANDED, and the Commissioner's cross-motion to affirm (ECF No. 23)
6 is DENIED.

7 IT IS FURTHER ORDERED that under Federal Rule of Civil Procedure 25(d), the clerk of court
8 is directed to substitute Andrew Saul² for Nancy Berryhill as the respondent Commissioner of the Social
9 Security Administration on the docket for this case.

10 The Clerk of Court is directed to enter final judgment in favor of Plaintiff and against the
11 Defendant, reversing the final decision of the Commissioner.
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13 DATED this 24th day of January, 2020.



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15 CAM FERENBACH
16 UNITED STATES MAGISTRATE JUDGE
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24 ² After the parties briefed the motion, Andrew Saul was sworn in as Commissioner of
25 the Social Security Administration. As permitted under Federal Rule of Civil
Procedure 25(d), the clerk of court is directed to substitute Andrew Saul for Nancy
Berryhill as the respondent Commissioner of the Social Security Administration on
the docket for this case.